UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 01-1985

CARMEN CABALLERO-RIVERA,
TALI BENET-SOTO,
Plaintiffs, Appellants,
V.
THE CHASE MANHATTAN BANK, N.A.,
HOUSING INVESTMENT CORP.,
Defendants, Appellees.

JUDGMENT

Entered: January 10, 2002

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By The Court:
Richard Cushing Donovan, Clerk
By:
Chief Deputy Clerk
[cc: Messrs. Tous-Rodriguez & Burgos-Perez]

United States Court of Appeals
For the First Circuit

No. 01-1985

CARMEN CABALLERO-RIVERA,
TALI BENET-SOTO,
Plaintiffs, Appellants,
V.
THE CHASE MANHATTAN BANK, N.A.,
HOUSING INVESTMENT CORP.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. José Antonio Fusté, U.S. District Court Judge]

Before
Boudin, Chief Judge, Kravitch, * Senior Circuit. Judge, and Torruellas, Circuit Judge.

José M. Tous Rodríguez, for appellants.
Heriberto J. Burgos-Pérezm with whom Fiddler, González & Rodríguez LLP and Mariano Mier-Romeu, were on brief, for appellees.
January 10, 2002

*Of the Eleventh Circuit, sitting by designation

Per Curtain. Plaintiffs-appellants Carmen Caballero Rivera and Tali Benet-Soto appeal from the district court's dismissal of their case. Specifically, appellants argue that the district court erred in applying the doctrine of res judicata to

preclude their claim.

A brief examination of the procedural history of this case, however, reveals the accuracy of the district court's ruling. In 1999, plaintiffs filed suit in district court claiming that defendants had defrauded them by submitting false documents to the Superior Court of Puerto Rico in a previous lawsuit between the parties.[1] Shortly after the suit was filed, defendants moved for summary judgment. The district court granted defendants' motion on the grounds that plaintiffs failed to raise a genuine issue of material fact by not satisfying the heightened pleading requirements of Federal Rule of Civil Procedure 9(b)[2]. Plaintiffs did not appeal the district court's ruling.

Instead, plaintiffs filed this suit in Puerto Rico Superior Court. Defendants removed the case to federal court and filed a motion to dismiss. The district court granted the dismissal, ruling that the doctrine of res judicata precluded plaintiffs' claim.

1.In the interest of brevity, we refrain from discussing the lawsuits filed by plaintiffs against defendants in 1985, 1992, and 1995 over the same issue.

2 Federal Rule of Civil Procedure 9(b) provides: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.,,

The doctrine of res judicata promotes the goals of fairness and efficiency by preventing vexatious or repetitive litigation. See Commit v. Sunnen, 333 U.S. 591, 597 (1948). A claim will be precluded by res judicata if the following elements are demonstrated: " (1) a final judgment on the merits in an earlier suit, (2) sufficient identicality between

the causes of action asserted in the earlier and later suits, and (3) sufficient identicality between the parties in the two suits." Gonzalez v. Banco Central Corp., 27 F.3d 751, 755 (1st Cir. 1994).

In the instant case, all three factors are so clearly present that only a brief discussion of them is necessary. First, the summary judgment ruling that disposed of plaintiffs' earlier claim constitutes "a final judgment on the merits." See Dowd v. Soc'y of St. Columbans, 861 F.2d 761, 764 (Ist Cir. 1988) (noting that " [s] ummary judgment constitutes a final judgment on the merits for purposes of applying res judicata").[3] Second, by plaintiffs' own admission, the instant case is identical to the previous suit. Third, there is no question that the two suits contain the same parties.

3 Without considering the merits of the prior dismissal, we find no procedural error in the district court's decision to grant summary judgment on the basis of plaintiffs' inability to satisfy the pleading requirements of Federal Rule of Civil Procedure 9(b). See, e. cf., Murr Plumbing, Ing. v. Scherer Bros. Fin. Servs. , 48 F.3d 1066, 1070 (8th Cir. 1995) (ruling that "[a] district court may enter summary judgment dismissing a complaint alleging fraud if the complaint fails to satisfy the requirements of Rule 9 (b) ") ; see also Whalen v. Carter, 954 F.2d 1087, 1098 (5th Cir. 1992) (same) . our position is further buttressed by the fact that plaintiffs failed to satisfy the pleading requirements after eight years of litigation.

Because we find no error in the district court's application of res judicata, we affirm.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CARMEN CABALLERO-RIVERA and
TALI BENET-SOTO
Plaintiffs
Vs CIVIL 00- 18 5 8CCC

THE CHASE MANHATTAN BANK, N.A.
HOUSING INVESTMENT CORP.
Defendants

JUDGMENT

For the reasons stated in our Order of this same date, this action Is DISMISSED. Costs and fees are awarded to the defendants.

SO ORDERED AND ADJUDGE

At San Juan, Puerto Rico, on May 17, 2001.
(signed)
CARMEN CONSUELO, CEREZO
United States District judge

IN THE UNITED STATES DISTRICT COURT,
FOR THE DISTRICT OF PUERTO RICO

CARMEN CABALLERO-RIVERA and
TALI BENET-SOTO)
Plaintiffs
Vs CIVIL 00-1858CCC
THE CHASE MANHATTAN BANK, N.A.
HOUSING INVESTMENT CORP.
Defendants

---

0 R D E R

This is another case In the continuing saga of the construction defects of Segovia Condominium, brought by two residents. Once again, the case was flied In the Court of First Instance of Puerto Rico and removed here by defendant Chase Manhattan Bank on the grounds of diversity of Jurisdiction. As is the pattern, Chase has filed a dispositive motion, In this case, a Motion to Dismiss **(docket entry 10)** based on grounds of res judicata and collateral estoppel and plaintiffs have opposed It **(docket entry 11).** Plaintiffs rationalize the filing of this suit on the decision in their recent case, Caballero v. The Chase Manhattan Bank, et al., Civil 99-1375 (JAF). They draw our attention to statements by judge Fuste in his opinion:

... Congress enacted Rule 60(b) to allow a party to attack collaterally a previous determination by proving the previous judgment arose from fraud....

... When a previously unlitigated fraud claim that, If true., would destroy the foundation of the state court judgment at

Issue In accordance with state law., a district court should permit a complete evidentiary disposition on the fraud point. To do so temporarily Ignores any issue of claim preclusion encompassed in the doctrine of res judicata. Then, should the district court determine that fraud was committed pursuant to state law, it may set aside the previous state court Judgment. (Opinion, page 10.) The Court concluded that the plaintiffs were alleging a previously unlitigated claim of fraud, and, the fraud exception applied. The court then went on to examine the evidence on the fraud point, thereby setting aside momentarily the claim preclusion of the doctrine of res judicata." (Id. at p. 12.)

The court found that the plaintiffs had failed to meet the required standard of particularity:

... Their complaint is filled with bald assertions of a conspiracy which are unsupported by any solid facts. The closest Plaintiffs come to meeting the standard Is the allegation that engineer Agapito Font was paid by means other than accepted compensatory practices.... [T]his is not enough. Plaintiffs fall to show how the alleged fraud was perpetrated. Furthermore, Plaintiffs' allegations In no manner demonstrate that engineer Agapito Font report was false. Rather, Plaintiffs rely upon a structural study they commissioned In 1989 which concluded that the building was In a horrendous condition and could collapse. This Is simply not enough.

(Opinion, page 13) The court further notes that, "Audaciously, Plaintiffs are attempting to obtain some more bite at the proverbial apple In this case and have yet again failed to meet the heightened pleasing standards of which they were clearly on notice."

Of particular concern to us is paragraph 31 of the complaint, as translated:

Contrary to the judgment for dismissal from the Federal District Court, case 99137SUAF), supra, the plaintiff alleged

fraud to the Federal Court through he [sic] use of engineer Agapito Font reports, nevertheless, a reconsideration was not filed before that forum, since It Is well known that the same are sometimes resolved a year or more later, and the present case requires Immediate attention due to the hazardous condition of the building.

Plaintiffs' Intent is clear. Rather than ask for reconsideration of the order or appeal judge Fuste's decision to the Circuit Court,, they chose to file the matter anew, In the Commonwealth court.

Plaintiff's Inarticulately argues that the dismissal was based on F.R.Cv.P. Rule 9(b) and, therefore, does not constitute a decision on the merits. The fact is, however, that as seen above, judge Fuste did address the merits of the allegations and found that they did not sufficiently demonstrate a cause of action for fraud. If plaintiffs actually did have a fraud claim which could have been brought to this forum,, they could have requested the opportunity to amend the complaint. Their failure to do so, and their failure to appeal from that decision, makes judge Fuste's decision the one by which we are bound.'

Accordingly, for the above-stated reasons, the Motion to Dismiss (docket entry 10) is GRANTED. Because this is one more episode In a long line of vexatious suits, we award costs and fees to the defendants.

SO ORDERED.

At San Juan, Puerto Rico, on May 17, 2001.

CARMEN CONSUELO DE CEREZO,
United States District judge

'We find plaintiffs' argument that, because the Issue Is a state

cause of action. the case should be remanded. to be meritless. This action is here pursuant to our diversity jurisdiction.

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

CARMEN CABALLERO RIVERA,ET AL., Plaintiffs, v THE CHASE MANHATTAN BANK; ET AL., Defendants.	Civil 99-1375 (JAF)

f

OPINION AND ORDER

Plaintiffs, Carmen Caballero Rivera and Talí Benet Soto, bring this diversity action for relief of judgment against Defendants, the Chase Manhattan Bank, N.A. and its subsidiary Housing Investment corporation, alleging that Defendants committed fraud in prior state court proceedings concerning the certification and legality of alterations and repairs done on a condominium, "Condominio Segovia" located in Hato Rey, Puerto Rico. Plaintiffs move for for partial summary judgment Summary judgment. They contend that the condominium is in such poor that it may collapse at any moment and that, as a result, it could not have met the local building and construction standards which Defendants alleged in the state court proceedings. Defendants oppose Plaintiffs' motion and cross-move for summary judgment. Civil No. 99-1375 (JAF).

1. Factual Background

Plaintiffs, a group of homeowners who purchased apartments at the condominium and the Board of the condominium, filed suit in the Puerto Rico Superior Court, No. 79-994 (806), against Defendants. They alleged nonconformance with local building standards and regulations throughout the renovation and repairs to the building that Defendants financed. The state court granted Defendants' unopposed summary judgment motion.

Plaintiffs allege that Defendants, in submitting their motion for summary judgment, committed a fraud in the state court proceedings by presenting fraudulent documents which attested that the condominium was repaired and certified according to state construction laws. Specifically, Plaintiffs maintain that engineer Agapito Font openly conspired with Defendants by appearing at a deposition and averring falsely that the alterations and repairs made by Defendants did not negatively impact the structure of the *building* and met all applicable construction laws. Plaintiffs support their allegations with a structural study conducted in 1989 by an engineer, Dr. Rafael Jim6nez, which indicates that the condominium is in danger of collapsing, and proffered evidence demonstrating that Defendants directly paid Agapito Font from their own corporate accounts instead of following the proper compensation procedure. Plaintiffs contend that the building contains structural defects which do not meet applicable building standards, and that Defendants, fraudulent scheme resulted in state certification and the permits necessary to sell and finance Condominio, Segovia.

Defendants have submitted a cross-motion for summary judgment and in opposition to Plaintiffs, partial summary judgment motion. Specifically, they allege lack of subject matter jurisdiction and that the facts upon which Plaintiffs base their motion are insufficient, as a matter of

law, to set aside final judgments.

11

Procedural Background

Plaintiffs filed a state court complaint in 1985. Plaintiffs allege that during that proceeding, they were unable to oppose Defendants' motion for summary judgment because Defendants withheld, at all times prior to the court's disposition of the matter, the structural plans for the building which Plaintiffs needed in order to oppose the motion.

In 1992, Plaintiffs then filed a *motion in* District Court alleging Racketeering influenced and Corrupt Organization (RICO) charges against Defendants pursuant to **18 U.S.C. 1961-1968 (1982).** The court dismissed the complaint for failure to meet the heightened pleading requirements necessary to sustain a RICO claim. See Tali Benet Soto v. The Chase Manhattan Bank, N.A. et al, 791 F.Supp. 914, 917 (D.P.R. 1992).

In 1995, Plaintts'counsel in the instant action filed a personal cause of action for relief against the judgment in the state court alleging that Defendants had committed a fraud in the state court. The court dismissed the action for lack of standing, since Plaintiffs'counsel no longer resided in the condominium.

In 1999, Plaintiffs filed the instant action for relief of judgment pursuant to Fed. R. Civ. P. 60 (b). Defendants answered Plaintiffs'complaint, moved for dismissal, and asserted a number of affirmative defenses, including: (1) lack of subject mater jurisdiction; (2) the complaint fails to state a claim upon which relief may be granted; (3) the complaint is barred by the doctrine of res judicata; (4) the complaint is collaterally estopped by the previous federal and state actions; (5) the complaint is time barred by the applicable statute of limitations; (6) Plaintiffs

have failed to allege fraud with specificity; (8) lack of proximate cause; (9) Plaintiffs failed t6o mitigate damages; (10) the amount of damages claimed by Plaintiffs is exaggerated and speculative; (11) Defendants did not exceed their legitimate functions as lenders; (12) Plaintiffs are obstinately this action and should, therefore, be liable to Defendants for their attorneys fees, costs, and expenses to defend this case, and (13) Plaintiff's counsel has unreasonably and vexatiously multiplied proceesings in this case and should be santioned.

Plaintiffs opposed Defendants'motion to dismiss and, thereafter moved to submit and amended complaint.

III

Summary Judgment Standard

"The core purpose of summary judgment is to pierce the boilerplate of the pleadings, and examine the parties, proof to determine whether a trial actually is necessary. Vega-Rodriquez v. Puerto Rico Telephone Co., **110 F.3d 174, 178** (16" Cir. 1997) (quoting Wynne v. Tufts Univ. Sch. of Med., *976* F.2d *791, 794* (Vt Cir. *1992)).*

Therefore, if the pleadings, depositions, answers to interrogatories, admissions, and any affidavits on file show that there is no genuine issue as to a material fact, then the moving party is entitled to judgment as a matter of law. See FED. R. CIv. P. 56 (c) .

Where the moving party does not have the burden of proof at trial, that party must make a showing that the evidence is insufficient to support the nonmoving party's case. See Celotex Corp. v. Catrgtt. *477 U.S. 317, 325 (1986).* Once the initial showing has been made, it is up to the *nonmoving party* to establish the existence of a genuine disagreement as to some material fact. See United States *v.* One Parcel of Real Property with **Bldas.,960 F.2d 200, 204 (1st Cir. 1992).** In this context, "genuine means that "the evidence is such that a reasonable jury could return a verdict

for the nonmoving party, "and a "material fact" is one which "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 4 77 U.S. 242, 248, 257 (1986) . Throughout this analytical process, any doubt as to the existence of a *genuine issue* of fact *should be* resolved against the moving party, see Adickes y. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970), and courts "must view the evidentiary record in the light most hospitable to the nonmovant and must indulge all reasonable inferences in his favor. Sheinkoof v. Stone, 927 F.2d 1259, 1262 (lot Cir. 1991); Griggs-Rvan y. Smith, 904 F.2d 112, 115 (let Cir. 1990).

IV.
Analysis

We are faced with a number of issues in this case, the most prescient being whether federal jurisdiction exists. Defendants .claim there is no jurisdiction because we are without authority to hear direct appeals of state court decisions and Fed. R. Civ. P. 60(b) does not provide an independent ground for jurisdiction.

Plaintiffs respond that jurisdiction is premised upon diversity of citizenship in the present action and fraud in the state proceeding pursuant to Fed. Civ. R. 60(b).[1] Thus, we are

---

[1] Rule 60(b) provides, in relevant part:

1. On motion upon scuh terms are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for....(3) fraud (whether heretofore denominated intrinsic or extrinsic) misrepresentation, or other misconduct of an adverse party.....The motion shall be made wqithin a reasonable time, and for reasons (2), and (3) not more than one year after the judgment, order, or profceeding was entered or taken. This rule does not limit the power or a court to

presented with a mottled web of jurisdictional issues which need to be untangled to answer our inquiry.

A. Diversitv Jurisdiction

Federal Courts have limited jurisdiction, and statutes which grant jurisdiction must be strictly construed. See Thomson v. Gaskill, 315 U.S 442, 446 (1942), This case involves no federal question, This, jurisdiction depends solely upon diversity of citizenship of the parties, Section 1332 of Title 28 of the United States Code proceeds federal courts with diversity jurisdiction. See 28 U.S.C. Sec. 1332 (1994). Diversity jurisdiction requires complete diversity between all the plaintiffs and all the defendants and an amount in controversy of $75,000.00 or more. See Strawbridge v. Curtiss. 7 U.S. (3Cracnch) 267 (1806); Casas Machines, Inc. v. Mita Copystar America, Inc., 42 F. 3d 668, 673 (lot Cir. 1994). Where a plaintiff's claim of diversity is challenged, the plaintiff has the burden of proof. See Thomson v. Gaskill, 315 U.S. 442, 446 (1942); Hawes v. Club Ecuestre El Comandante, 598 F.2d 698, 702 (1st Cir 1979). Diversity is determined as of the time of the filing of the complaint. See Kidd v. Hilton of San Juan, 251 F.Supp. 465, 468 (D.P.R. 1966)

Plaintiffs base jurisdiction upon diversity of citizenship. They allege complete diversity between all Plaintiffs and all Defendants, and sufficient damages to satisfy the amount in controversy requirement. Therefore, they have stated a prima facie case of diversity of citizenship which Defendants have not challenged.

Defendants have, however, challenged our jurisdiction in this case upon the underlying cause of action,

---

entertain and independent action to relieve a party from a judgment, order or proceeding ..... to set aside a judgment for fraud upon the court..
Fed. R. Civ. P. 60 (b).

fraud in the state court proceedings. Defendants maintain that we lack subject matter jurisdiction to review collaterally prior final judgments of the Puerto Rico Superior Court. While it is true that federal courts generally lack jurisdiction to review judgments and decisions of state courts, See Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1982); see also 28 U.S.C. S 1257 (1990), we are dealing with an allegation of fraud which, at times, is treated differently.

B. Res Judicata, Full Faith and Credit, and the Fraud Exception

The fundamental doctrine of res judicata, rests at the core of our judicial system[2]. The doctrine prohibits a claim from being litigated repetitiously outside of the normal appeals process, and furthers the goals of finality and certainty by the application of the doctrine. Standing alongside the fundamental doctrine of res judicata is the constitutional mandate that all courts in the United States, in general, must give full faith and credit to the decisions of other courts, be they territorial, state, federal, or special tribunals. See U. S. CONST. art. IV, S 1.[3] The full faith and credit principle also

---

[2] Res judicata is a "general and well-established doctrine conceived in the light of the maxim that the interest of the state requires that there be an *end* to litigation a maxim which comports with common sense as well as public policy." Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 401 (1981) (Quoting Reed v. Allen, 266 U.S. 191, 198-99 (1932)).

[3] The Clause provides that [f]ull Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State".U.S. CONST. art. IV, S 1.

furthers the goals of certainty, finality, and comity in legal dealings within our nation. Nonetheless, the Federal Rules of Civil Procedure contain an exemption to the strictures of res judicata in cases, like the instant action, in which there is an allegation of fraud which underlines the original state courts proceeding. It is a general precept that judgments obtained by fraud do not merit the routine deference courts normally grant to previous determinations. Accordingly, Congress enacted Rule 60(b) to allow a party to attack collaterally a previous determination by proving that the previous judgment arose from fraud. See FED. R. Civ. P. 60 (b).

Of course, this is not the case if fraud was the subject of the a previous state litigation. In that case, res judicata would apply. See Heiser v. Woodruff, 327 U.S. 726, 736-37 (1946) ("Nor can a[] [collateral] attack be sustained on a judgment allegedly procured by fraudulent representations of the plaintiff, when the charge of fraud has been rejected in previous litigations by the parties to the suit in which the judgment was rendered, or their representatives.*). In other words, we are authorized to ease the strictures of res judicata doctrine in certain circumstances. When a previously unlitigated fraud claim that, if true, would destroy the foundation of the state court judgment at issue in accordance with state law, a district court should permit a complete evidentiary disposition on the fraud point. To do so temporarily ignores any issue of claim preclusion encompassed in the doctrine of res judicata. Then, should the district court determine that fraud was committed pursuant to state law, it may set aside the previous state court judgment. The First Circuit has explained the interplay between federal and state judicial determinations in the case of the fraud exception. See In re Giorgio, 862 F.2d 933, 936 (1" Cir. 1988). A federal court is empowered to set aside a state court judgment only if, in accordance with state law, the judgment

is faulty. "[Tlhere can be no life to a state law claim, when a state court in a related prior proceeding authoritatively says that none exists. Giorgio, 862 F.2d at 936 (citations omitted) Hence, all fraud determinations made by federal courts turn upon the applicable state law. In other words, a federal court is precluded from making a fraud determination if a state court has already passed judgment on the same claim. This conclusion is necessary to preserve the balance of powers between state and federal judiciaries and to ensure that federal courts do not abrogate the Constitution and seize the power of appellate review over state court decisions. Our inquiry, then, is whether the fraud exception applies in this case. We find that it does.Plaintiffs allege a previously unlitigated claim of fraud, that engineer Agapito Font conspired with Defendants to present false documents and testimony to the state court, that, if true, would erode the *foundation of* the state court judgment at issue according to state law. Accordingly, we will examine the evidence on the f raud point, thereby setting aside momentarily the claim preclusion of the doctrine of res judicata.[4]

1. Fraud and Rule 9

As a general matter, in an action with fraud at its

---

[4] We note that Defendants also raise a statute of limitations defense to the fraud claim. However, the Supreme Court has held that "equity,* could enjoin the enforcement of a judgment at law obtained by the use of a forged *instrument and* false testimony if the falsity was not discovered until after the judgment had been entered and'the time for a new trial motion had run." Bailey v. Internal Revenue Service, 188 F.R.D. 346 (D. Ariz. 1999) (citing 11 WRIGHT, MILLER & KANE, 5 2681

center. Fed.R. Civ. P. 9 [5]imposes a heightened pleading standard. See Lucia v. Prospect St. High Income Portfolio, Inc., 36 F.3d 170, 174 (1st. Cir 1994) Rule 9(b) "requires specification of the time, place, and content of an alleged false representation, but not the circumstances or evidence from which fraudulent intent could be inferred." McGint v. Beranger Volkswagen, Inc., 633 F.2d 226, 228 (19' Cir.1980) ; see also Greebel v. FTP-Software. Inc., 194 F.3d 185, 193 (1st. Cir 1999).

The purposes behind Rule 9(b) are threefold: (1) to place the defendants on notice and enable them to prepare meaningful responses; (2) to preclude the use of a groundless fraud claim as a pretext to discovering a wrong or as a strike suit;' and (3) to safeguard defendants from frivolous charges which might damage their reputations." New England Data Services. Inc. v. Becher, 829 F.2d **286, 289 (lot** Cir. **1987);** see also Suna v. Bailey Cori), 107 F. 3d 64, 68 (1st. Cir . 1997)

Plaintiffs in this case have failed to meet the required standard of particularity. Their complaint is filled with bald assertions of a conspiracy which are unsupported by any solid facts. The closest Plaintiffs come to meeting the standard is the allegation that engineer Agapito Font was paid by means other than accepted compensatory practices, i.e., from Defendants, escrow account. However, this is not enough. Plaintiffs fail to show how the alleged fraud was perpetrated. Furthermore, Plaintiffs' allegations in no manner demonstrate that engineer Agapito Font's report was false. Rather, Plaintiffs rely upon a structural study they commissioned in 1989 which concluded that the building

---

[5] Rule9(b) provides:

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.

was in a horrendous condition and could collapse. This is simply not enough. See id. at 68 (quoting Rayduk v. Lanna, **775 F.2d 441, 444** (1st. Cir. 1985) ("Mere allegations of fraud, corruption or conspiracy, averments to conditions of mind, or referrals to plans and schemes are too conclusional to satisfy the particularity requirements, no matter How many times such accusations are repeated."). A study conducted four years after the lawsuit in which it is offered as proof of fraud is not a reliable means of supporting Plaintiffs, claims our conclusion is reinforced by the fact that Plaintiffs have been engaged in litigation surrounding this very issue for eight years, to no avail. *In 1992, Plaintiffs* filed their civil RICO claim a in district court. As Rule 9(b) applies to the predicate acts underlying a civil RICO claim, -see New England Data Services. Inc. y.Becher , 829 F.2d 286 (1st. Cir. 1987) [6] the district 'court dismissed the claim for failure to meet the heightened pleading *standards. See* Tali Renet Soto et al. v. Chase Manhattan Bank. N.A. et al.. 791 F. Supp 914, 917 (D.P.R. 1992) Audaciously, Plaintiffs are attempting to obtain one more bite at the proverbial apple in this case and have yet again failed to meet the heightened pleading standards of which they were clearly on notice. We do not sanction such behavior. Plaintiffs, thoroughly advised of the heightened pleading standard, have failed, once again, to meet it.

In this same vein, we find that Plaintiffs have failed to state an independent action pursuant to Rule 60(b). See

---

[6] While Becher specifically dealt with predicate acts of mail and wire fraud, the court announced, with respect to Rule *9(b),* the "degree of specificity is no more nor less than we have required in general fraud and securities fraud cases." -1d. at 290.

United States v. Beggerly, 524 U.S. 38, 46 (1998) (stating that "an independent action 2 should be available only to

prevent a grave miscarriage of justice.") if Plaintiffs cannot meet heightened pleading standards after eight years of litigation, it is clear that no serious malignment of justice is occurring. We, therefore, grant Defendants'motion for summary judgment.

V.

Conclusion

We **GRANT** Defendants motion for summary judgment. No sanctions are imposed in this case.
This Opinion and order disposes of Docket Document NOS. 11, 14A, 14B, and 17.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 30 day of March, 200
Jose Antonio Fuste
U. S. District Judge

CERTIFIED TRANSLATION

COMMONWEALTH OF PUERTO RICO
SUPERIOR COURT - SAN JUAN PART

CARMEN CABALLERO RIVERA, TALI BENET SOTO Plaintiffs vs. THE CHASE MANHATTAN BANK; HOUSING INVESTMENT Defendants	CASE: KAC00-2270(902) RE: CIVIL ACTION; DAMAGES; HIDDEN DEFECTS

COMPLAINT

TO THE HONORABLE COURT:

COMES NOW party plaintiff, through their undersigned counsel, and respectfully state, allege and pray as follows:

1. Housing Investment Corp., was a subsidiary of Chase Manhattan Bank, N.A., actually known as The Chase Manhattan Bank, and both of them constructed, developed, repaired and promoted the building known as Condominio Segovia.
2. The defendants are liable for all actions mentioned in the present complaint, by granting the financing to the constructors for the construction of the building known as Condominio Segovia, breaching the clauses of the interim loan contract, violating Puerto Rico's construction permits, disbursing monies from the interim loan in order to try to

repair the building without following the approved blue prints by the concerned agencies, with no consideration of the building codes, and leaving the structure in ruins and in danger of collapsing, in total disregard of the persons living there.

3. The defendants paid an engineer by the name of Agapito Font, with their corporate checks, in order for him to illegally intervene with the building and to cover up a series of deficiencies leaving it in ruins and in danger of collapsing.

4. This action is of primary public interest, for which it does not apply the doctrine of judged matter or collateral impediment, be it under its traditional version or the version known as intrajurisdictional jurisprudence.

5. The defendants committed fraud against the Superior Court of Puerto Rico in the case 79-7994, Sonia Ortiz Ortiz v. The Chase Manhittan Bank, N.A.

FRAUD TO THE COURT:

6. The building known as Condominio Segovia, shifted from its foundation.

7. The defendants, as it comes forth from some minutes dated January 14, 1975, represented by Messrs. Dionisio Ramirez and Manuel Jimenez, proceeded to make certain agreements for engineer Agapito Font to proceed with the alignment of the building known as Condominio Segovia, without following the blue prints originally approved for the construction of the same by the concerned agency, and leaving the building in ruins.

8. . That while these interventions were being made by said engineer Agapito Font, some related reports were distributed wherein he informed the agreed upon illegal interventions in order for him to be paid for his services by the defendants.

9. That prior to the reports made by engineer Agapito Font, he would go by the offices of Housing Investment Corp., and Housing Investment Corp., subsidiary of Chase Manhattan Bank, would pay for his fees with corporate checks.10. That with the purpose of making all those illegal repairs, the defendants put in an escrow account the amount of $655,000.00 from which payments were made for the alleged repairs, knowing that the same were illegal and would endanger the security of the people in the building.

11. Engineer Agapito Font appeared for a deposition and under oath declared that the reports were certifications, that he had fixed the building, and that the same was in perfect condition.

12. Later on, the defendants, during the month of November 1994, used that evidence in a motion under oath for summary judgment, to obtain the dismissal of case 79-7994, supra, before the Superior Court of Puerto Rico.

13. That among other things, engineer Agapito Font cut an unnumbered amount of iron rods from the transversal weight columns "shear walls", and substituted them with steel plates.

14. That Agapito Font stated in a deposition under oath having repaired and certified the Condominio Segovia, presenting the referred reports or briefs, knowing that the building's concrete walls do not comply with the demands of the Building Code.

15. That this technique utilized causes a column defect, that when force is made with the concrete, the same breaks and the building may collapse.

16. That the shear walls provide ductility for the building in cases of hurricanes or earthquakes. Therefore, the buildings lacks capacity to withstand earthquakes or hurricanes.

17. That in a Motion for Summary Judgment the attorneys for the defendants appeared and used the reports or briefs of engineer Agapito Font, under oath, and before the

consideration of the Superior Court, in case 79-7994, and obtained the dismissal of the pending litigation through summary judgment oh January 31, 1986, knowing that the reports were created in an illegal manner and that perjury was being committed.

18. That the judgment of the Superior Court dated January 31, 1986, determined that the said construction deficiencies were repaired and certified by. engineer Agapito Font, this based on the reports, briefs or certifications of the repairs presented by the defendants before the court in order to perpetuate the fraud by the attorneys of the defendants.

19. That litigation 79-7994, supra, had been presented in order to find a remedy to the hidden defects affecting said building, among these, the cutting of the iron rods in the columns "shear walls", for which it was therefore dismissed because of the defendant's fraudulent acts, by not being able to evidence the defects.

20. That no engineer in Puerto Rico can vary or change approved blue prints for construction under Planning Regulation #7, known by law as Building Regulation, administered by the Regulation and Permit Administration (ARPE).

21. In the case *Federal Insurance Co. v. Housing Investment Corp.*, 93 BR 838 (1988), the Federal Bankruptcy Court determined, also, that the defendants had also advanced the amount of $84,982.61, from their pocket and directly to other subcontractors in order to conclude the construction of the building known as Condominio Segovia.

22. The defendants totally controlled the process of construction and repair of the building and left it in ruins.

23. In its judgment for dismissal in the case of *Tali Benet Soto. et* als. *V. The Chase Manhattan Bank, et als.* 99-1375 (JAP), the Federal District Court determined that the defendant Housing Investment Corp., directly paid engineer Agapito Font and how the fraud alleged herein was

committed against the court, to later on dismiss the same under Rule 9(b) of Civil Procedure. (Included is the, decreed judgment.)

24. The plaintiffs were not able to oppose the Motion for Summary Judgment on State case 79-7994; supra, because:

a. Dr. Rafael Jimenez, who made the structural study, had no blue prints, as built, in order to form an opinion in opposition, reason for which a computerized blue print had to be made to be able to make the determinations presented in the present complaint.

b. The amount of $60,000.00 had to be collected in order to be able to make the structural study.

The study took a while because the apartments had to be entered in order to investigate the building and it was not until 1989 that the same was concluded.

25. The defendants also obtained the use permit in a fraudulent manner, since the same certifies having been obtained in accordance with the blue prints originally approved by the Regulations and Permit Administration.

JUDGMENTS ENTERED IN THE FEDERAL DISTRICT COURT OF PUERTO RICO.

26. In 1992, the Federal District Court for Puerto Rico entered a judgment for dismissal under Rule 9(b) of Federal Civil Procedure in case Tay Benet Soto et als. Vs. The Chase *Manhattan Bank, et* als, 791 F.Supp. 914, 917 (D.P.R. 1992), regarding Racketeering Influenced and Corrupt Organization, based on the Federal Court deciding that it had not been alleged the inclusion of the lefters'in which postal service was used with the specificity required by the first circuit, this even though the same were included for the record. The

judgment is not a judged matter, as stated in the case Tali Benet Soto et als. Vs. The Chase *Manhattan Bank et* als. 99-1375(JAF).

Not being the same res judicata, since the present action is of State level and under the intrajurisdictional jurisdiction, it does not merit full credit, it is not a collateral impediment, nor does it constitute judged matter, the same is not on the merits, since the same is entered based on a procedural problem with the use of the letters in the federal mail.

27. On March 30th , 2000, the Federal District Court of Puerto Rico entered a judgment refusing to intercede in the case *Tali Benet Soto et als Vs. The Chase Manhattan Bank et als.*, 99-1375(JAF), because according to the judgment, it had not been alleged with enough specificity the fraud committed to the court under Rule 9(b) of Federal Civil Procedure, as demanded by the first circuit.

28. The referred judgment for dismissal from the Federal District Court, case 99-1375(JAF), of March 30, 2000, does not constitute res judicata, under the interpretative jurisprudence of intrajurisdictional character, by it not being a jidgment on the merits, the present being a State level controversy, and only being adjudicated the lack of specificity in the allegations of fraud in the complaint, as determined and alleged by the federal court, very special requirements from the first circuit.

29. The referred judgment for dismissal from the Federal District Court, case 99-1375(JAF), determined that engineer Agapito Font was paid by the defendants through compensation forms unacceptable in the construction financing industry.

30. That the doctrine regarding specificity in the allegations in the jurisdiction of Puerto Rico, as well as in other federal jurisdictions, is totally different and more flexible than the one denounced by the Federal District Court of Puerto Rico. In *Carrasquillo v. Uppit & Simonpietri, Inc.*, **98 D.P.R. 659,**

662 (1970), and in *Garcia Lopez v. Mendez Garcia,* 102 D.P. R. 383, 386 (1974), was abandoned the qualification of solid, clear and convincing and uncontested proof.

31. Contrary to the judgment for dismissal from the Federal District Court, case 99-1375(JAF), supra, the plaintiff alleged fraud to the Federal Court, through he use of engineer Agapito Font's reports, nevertheless, a r6consideration was not filed before that forum, since it is well known that the same are sometimes resolved a year or more later, and the present ca~e requires immediate attention due to the hazardous condition of the building.

32. That at all times in the cases cited in the present complaint regarding the Condominio Segovia, has been involved the law firm of Fiddler, Gonzalez & Rodriguez.

33. In the judgment of January 31, 1986, case 79-7994, supra, the main center of the fraud are the reports of engineer Agapito Font.

34. Dr. Rafael Jiménez, structural engineer, contracted by the Board of Directors of the Condominio Segovia, made a study which was concluded in 1989, in which it is determined that the exists inherent danger and that the referred building may collapse. For which the building represents an inherent hazard to the persons living there.

35. That the present litigation represents a matter of public interest for which does not apply the doctrine of judged matter in any of its variants or collateral impediment.

36. That the present litigation is filed as a class action and under the doctrine based on the case of *De la Cruz v. Toro Sintes,* 112 D.P.R. 650(1982), wherein t he Supreme Court decides that because of security reasons a co-owner of a building may present a complaint without the majority of votes, when the common property of a Condominium is being affected.

PARTIES OF THE LITIGATION

37. The plaintiffs are the owners of two apartments

respectively in the building known as Condominio Segovia.

38. The Chase Manhattan Bank ("Chase"), is a created corporation and assumed all debts and responsibilities of the chase Manhattan Bank, N.A., Housing 16vestment, Corp., and Chemical Bank.

GENERAL ALLEGATIONS

39. Construction in Puerto Rico is vested on public interest.

40. Construction and the use of buildings in Puerto Rico are regulated by the state agency known as Regulations and Permit Administration.

41. No engineer may intervene in order to alter approved original blue prints for the construction of a building once they approved by the Regulations and Permit Administration (ARPE).

42. In order to alter a construction it is necessary to present blue prints once again for the approval or rejection of the changes.

43. The defendants illegally repaired the building known as Condominio Segovia, and they proceeded with the sale of the apartments.

44. The actions committed by the defendants were contrary to their regulations and to the contract of interim loans which required that the construction be made in accordance with the demands of the State, and in accordance with the permits granted for the construction.

45. The actions described in the present complaint demonstrate that the defendants exceeded themselves from the actions permitted to financing entities in the interim loans for construction.

46. The defendants controlled the repair of the building, paying directly to the contractors in open violation of the laws of the Commonwealth of Puerto Rico and of its interim loan contract.

47. The defendants directly sold close to 151 building

apartments.

48. The other corporations which took part in the scheme are do not exist at the time.

49. The defendants proceeded to repair the building fully aware that the concrete walls (hormigones) did not keep the required consistency demanded in the blue prints. For which the structure has an inherent danger for all those who live there.

50. Having concluded the supposed repairs, the defendants took in payment for 151 apartments the amount of $9,732,538.52, under the same fraudulent scheme pattern and in order to conceal the scheme.

51. The defendants secured the interim finance of the sale of the apartment, by including a penalty clause in the interim loan contract to the effect of paying by the developer the amount of $500.00 for each apartment financed by a bank other than the defendants.

52. In the judgment of January 31, 1986, case 79-7994, supra, the court determined the following:

a. That in January 1995, there was meeting with the defendants at the Housing Investment, Corp. offices, in which the defendants agreed and decided how the building was supposedly to be fixed.

b. Under that agreement the defendants allowed the iron rods of the shear walls to be cut, in order to be substituted for steel plates.

C. The Superior Court determined in its judgment that the deficiencies were repaired. (referring to all the repaired defects).

d. The Superior Court determined in its judgment that after the conclusion of the work, engineer Agapito Font certified that the repairs were correct.

53. At the time the judgment was entered it was impossible to determine the building's condition without performing the structural study.

54. The alleged certifications or reports in the State case 79-7994, supra, is the causal relation for the fraud for which a case of hidden defects was not proven inasmuch as the defendants countersigned and subscribed the false and fraudulent evidence produced by their engineer knowing that the same caused an act which tainted the process of justice.
55. The defendants did not follow the regulations known as Planning Regulation #7, known by law as Building Regulation, administered by the Regulations and Permit Administration (ARPE).
56. The building is weak for hurricanes and earthquakes and may also collapse due to the deficiency in the concrete walls (hormigones), in non compliance with the building codes.
57. The plaster is falling off because it was applied over a metal sheet which gives the appearance of being leveled. '
58. There is the existence of thousands of water filtrations and the contaminated water comes up the owner's bathrooms.
59. The elevator has a two feet (desaplomo).
60. The judgment entered by the Federal Court in case number 991375(JAF), makes the same determinations from the allegations of the complaint, dismissing the same because, as is believed by the court, time, place and content of the alleged fraud was not alleged. Very important and special requisite from the first circuit and rejected by the Supreme Court of Puerto Rico.

DAMAGES

61. The apartment of the plaintiff Carmen Caballero was purchased directly from the defendants and has been closed for the last seven years because the column rods exploded ejecting and breaking the plaster.
62. Plaintiff Carmen Caballero has paid the sum of $90,000.00 for the apartment plus the sum of $21,120 for maintenance. The plaintiff has sustained damages in the sum of $250,000.00

63. The buildings elevators are continuously out of order, making life impossible to plaintiff Tali Benet Soto, since the same is a (minusvalida) person whom has to move around in a wheelchair.
64. Tali Benet Soto, bought an apartment directly from the defendants and has paid approximately $79,200.00 and $20,000.00 in advance. The plaintiff has sustained damages in the sum of $500,000.00.
65. It is estimated that the damages to the property and total losses of all co-owners from Condominio Segovia, which total over three hundred apartments, adds up to the amount of fifty million dollars.
For which it is requested from this Honorable Court that it finds against the defendants for the amounts requested, as the complaint continues to be amended. That it be taken into consideration the fraud committed against the Superior Court which has allowed the damages to the plaintiffs to continue to escalate. In the same manner that they be ordered to make the arrangements for the cancellation of any mortgage with any expenses entailed therein.
The imposition of costs and attorneys fees is requested.

In addition, it is also requested that being the facts and circumstances the same for all those prejudiced, it is requested that the present be classified as a class action.

Respectfully submitted: May 3, 2000

José M. Tous Rodríguez
Attorney for Petitioners
P.O. Box 360532
San Juan, P.R. 00936-532
(787) 765-6433